December 14, 1994

Eric Wane Schroeder
2199 Kamehameha Highway
Honolulu, Hawaii 96819

Dear Mr. Schroeder:

Re: Public Access to PSD Policy Regarding Inmate Searches

This is in reply to your letter to the Office of Information Practices ("OIP") requesting an advisory opinion concerning your right to inspect and copy Department of Public Safety ("PSD") Policy No. 493.08.31 entitled "Searches of Inmates," and Oahu Community Correctional Facility Policy No. 7.08.02 entitled "Searches" under the Uniform Information Practices Act (Modified), chapter 92F, Hawaii Revised Statutes ("UIPA").

In OIP Opinion Letter No. 90-34 (Dec. 10, 1990), we examined whether PSD policies and procedures that have not been adopted as rules under chapter 91, Hawaii Revised Statutes, must remain confidential in order to avoid the frustration of a legitimate government function, under section 92F-13(3), Hawaii Revised Statutes.[1]

We concluded that federal court decisions applying Exemption 2 of the federal Freedom of Information Act, 5 U.S.C. § 552(b)(2) (1988) ("FOIA"), provided useful guidance in determining whether the disclosure of an agency's internal policies must remain confidential in order to avoid the frustration of a legitimate government function. Exemption 2 of FOIA permits agencies to withhold records "related solely to the internal personnel rules and practices of an agency."

[1]See also, OIP Op. Ltr. No. 94-19 (Oct. 13, 1994) (PSD policies regarding court appearance, transport of inmates, and protective custody management).

In Founding Church of Scientology v. Smith, 721 F.2d 828 (D.C. Cir. 1983), the leading case under FOIA's Exemption 2, the court articulated the following test for determining whether information is exempt under FOIA's Exemption 2:

> First, the material withheld should fall within the terms of the statutory language as a personnel rule or practice of the agency. Then, if the material relates to trivial administrative matters of no genuine public interest, exemption would be automatic under this statute. If withholding frustrates legitimate public interest, however, the material should be released unless the government can show that disclosure would risk circumvention of lawful agency regulation.

Scientology, 721 F.2d at 830 n.4.[2]

In Crooker v. Bureau of Alcohol, Tobacco & Firearms, 670 F.2d 1051 (D.C. Cir. 1981) (en banc), the court fashioned a two-part test for determining which sensitive materials are exempt from mandatory disclosure under Exemption 2. This test requires both that the requested document be "predominately internal" and that its disclosure "significantly risks circumvention of agency regulations or statutes." Id. at 1074.

[2]Since the disclosure of trivial administrative matters of no genuine public interest generally would not result in the "frustration of a legitimate government function," we believe that in determining whether an agency's internal rule or practice is protected from disclosure under section 92F-13(3), Hawaii Revised Statutes, the proper analysis is one that focuses upon whether disclosure of the policy significantly risks the circumvention of agency statutes or regulations, or the security of state correctional facilities and the safety of personnel employed therein. This is especially true since the federal courts have admonished that "a reasonably low threshold should be maintained for determining whether withheld administrative material relates to a significant public interest." Scientology, 721 F.2d at 830-31 n.4.

The concern in such a case is that a FOIA disclosure should not "benefit those attempting to violate the law and avoid detection." Id. at 1054.
Based upon federal court decisions under the FOIA, we concluded that the PSD may withhold access to those policies and procedures that have not been adopted as rules, and which meet both of the following tests:

1. The policy or procedure is "predominately internal," i.e., directed at agency staff and does not regulate members of the public or establish standards for agency personnel in deciding to proceed against or take action affecting members of the public; and

2. The disclosure of the policy or procedure would significantly risk the circumvention of agency regulations or statutes, or policies concerning the control of inmates or prison security; or render the policy operationally useless for its intended purpose.

See OIP Op. Ltr. No. 90-34 (Dec. 10, 1990); OIP Op. Ltr. No. 94-19 (Oct. 13, 1994).

After we received your opinion request, we contacted the U.S. Department of Justice, Federal Bureau of Prisons ("Bureau"), to determine whether, under the FOIA, the Bureau permits the public inspection and copying of Bureau policies concerning searches of inmates at federal correctional institutions.

By letter dated August 30, 1994, the Bureau's Assistant Director and General Counsel provided the OIP with a copy of its Program Statement 5521.04, "Searches of Housing Units, Inmates, and Inmate Work Areas." A copy of this letter is attached as Exhibit "A" for your information.

Since the Bureau does not withhold its policies concerning inmate searches under the FOIA, it is the opinion of the OIP that administrative policies that you seek from the PSD are not government records that must remain confidential in order to avoid the frustration of a legitimate government function under the UIPA. The federal government has determined that the disclosure of Bureau policies concerning inmate searches will not

compromise the security of federal correctional institutions or render the policies operationally useless for their intended purpose. So, too, we believe that disclosure of the PSD's policies regarding inmate searches will not compromise the security of State correctional facilities.

Please contact me at 586-1404 if you should have any questions regarding this opinion.

Very truly yours,

Hugh R. Jones
Staff Attorney

APPROVED:

Kathleen A. Callaghan
Director

HRJ:sc
Attachment
c: Honorable Eric Penarosa

Jack Campbell, Jr.
Deputy Attorney General